

CONFIDENTIAL COMMUNICATIONS TO THE CLERGY

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I. BACKGROUND

The fact that twelve states within the last five years have enacted statutes making confidential communications to clergymen¹ privileged is indicative of the need for this privilege. Only six of the fifty states do not have such statutes.

Sometimes an event within a state brings the legislature to the realization of the need. The "priest-penitent" statute enacted in Delaware in 1961 illustrates how legislatures respond to a need when a courtroom crisis occurs that receives publicity. In that year, John F. Van Sant, a Delaware police detective, sued his mother-in-law and father-in-law for \$1,000,000 for the alienation of the affections of his wife. His wife, Sheila, was the daughter of Donald P. and and Wilhelmina Dupont Ross, the defendants.

Van Sant's lawyer had the Rev. Percy F. Rex, Episcopal Rector, subpoenaed to testify as to conversations Van Sant had had with him fifteen months earlier. In the affidavit accompanying the subpoena, Van Sant stated (1) that he waived the privilege of keeping the communications secret, and (2) that the confidences were not told to Rev. Rex in the course of church discipline and consequently were not privileged. The Rector flatly refused to testify, waiver or no waiver. At that time, Delaware did not have a priest-penitent statute which would excuse him from testifying. The trial judge reserved decision on whether to cite the priest for contempt. Before the matter was ruled upon, the Delaware legislature enacted a priest-penitent privilege statute.² (This case, like so many that involve the priest-penitent statute, never reached the appellate level.)

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¹ The name "priest-penitent" will be used frequently here as the name of the privilege, although "clergyman," "ministers," "rabbis," "religious practitioners," and "Christian Science practitioners" appear in many statutes. "Priest and penitent" is the traditional name used to describe the privilege; it is short and universally used. "Priest" or "clergyman" will be used to include all clergymen of all denominations and rabbis unless otherwise indicated. Ordinarily "confession" will include both sacramental communications and nonsacramental confidential communications to a clergyman. The words "sacramental confession" are used occasionally in this work because this is the popular name, although it might be more correct to say "the sacrament of Penance," *sacramenti poenitentiae*, Caput III.

² See *The Living Church*, July 23, 1961, p. 6, and October 15, 1961. The Rector

For the courts to function at all in deciding civil and criminal cases, it is imperative that their fact-finding power include the authority to gain access to evidence, both documentary and testimonial. The general rule is that every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all actions and proceedings, civil and criminal.³ He may be required to testify, unless there is some policy of the law removing this requirement.

There are two important classes of potential witnesses who are excluded from the obligation to testify: Those who are incompetent because of immaturity or mental deficiencies and those not permitted or required to testify because of a privilege. This privilege may be that of the potential witness himself or the privilege of another who can prevent his testifying as to certain matters.

Some state legislatures have declared that there are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined in certain cases.⁴ Among privileged communications is the one between priest and penitent,⁵ which is considered in this article insofar as the fifty states have enacted statutes or the appellate courts have ruled upon it.⁶

There has been no absolute "priest-penitent" privilege in the common law in modern times,⁷ but the English judges have, as a

said, "I hope to establish a precedent. If I testify, then one precedent is established. If I don't testify, then another is established, and people will know there is a clergy in this state to whom they can go in confidence. An awful lot for the profession hangs on the decision here. I don't intend to testify, no matter what the judge decides."

³ See, e.g., Minn. Stat. Ann. § 595.02 (1947); Neb. Rev. Stat. § 25-1201 (1943).

⁴ Cal., Colo., Mont., Ore., Utah.

⁵ See footnote 22 *infra*. Hereafter, the citations of the various state statutes will not be referred to in footnotes because all the citations of the state statutes are included in that footnote. The only other statutes that will be cited in other footnotes will be those not directly pertaining to the privilege and which are not cited in footnote number 22.

⁶ The privilege in the federal courts will not be considered in this article.

⁷ N.Y. Times, April 29, 1959, p. 2, col. 2:

London, Apr. 28—The most Rev. Geoffrey Fisher, Archbishop of Canterbury, said today that the secrecy of confessions made to priests could not be sanctioned in the canon law of the Church of England until Parliament changed the law of evidence. . . . The present canon governing secrecy of the confessional dates from 1603 and is regarded as largely obsolete. . . . A Church of England spokesman said the seal of confession had not been tested in the courts, at least in modern times, and that, in any case, an Anglican priest would probably go to jail rather than disclose a confession. A Roman Catholic spokesman said: "The secrecy of the confessional is absolute. It has nothing to do

matter of judicial discretion, excused the clergy from testifying about matters revealed to them in their capacity as confessors.⁸

There still is no priest-penitent privilege statute in England, although the privilege has long been recognized in statutory enactments on the Continent.⁹ In this country, the first recorded case on the privilege came before the New York Court of General Sessions in 1813.¹⁰ Without benefit of statute, the court upheld the privilege where a priest of the Roman Catholic Church received stolen goods, returned them to their rightful owner, and then refused to testify before a grand jury and later at the trial concerning the identity of the one who stole the goods on the ground of priestly privilege. The court said, "A Catholic priest cannot be compelled to disclose, before a Court of Justice, what has been confessed to him in the administration of the sacrament of Penance." Four years later, in 1817, in a New York court, the same privilege was denied to a Protestant minister on the ground that his church did not require or have the "confession."¹¹ Then, in 1828, the first "priest-penitent" statute was enacted in New York:

No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.¹²

This statute, poorly drafted though it was, has served as a model for, or has greatly influenced the wording of, the statutes in over half of the forty-four states whose legislatures have enacted statutes recognizing this privilege.

with the law of the realm. Nothing in the world can change it, not even an Act of Parliament."

N.Y. Times, April 30, 1959, p. 19, col. 7: "London, Apr. 29—The clergy of the Church of England reaffirmed today the doctrinal principle that priests are bound to keep secret any sins disclosed to them in confessions. . . . The Archbishop . . . said the resolution reaffirmed the principle of secrecy designed 'to give security' to the penitent."

⁸ *Broad v. Pitt*, 3 C. & P. 518 (1828). Best, C. J., said "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence."

⁹ Typical of the continental statutes is section 151 of the Austrian Code of Criminal Procedure of 1873, which, as amended, reads: "The following persons must not be examined as witnesses, lest their testimony be void: (1) Ministers in regard to facts that were communicated to them either during confession or under the seal of secrecy."

¹⁰ *The People v. Daniel Phillips & Wife*, abstracted from Mr. Sampson's published Report, by P. McGroarty and reprinted in 1 Western Law Journal 109 (1843).

¹¹ *The People of N.Y. v. Christian Smith*, 2 City Hall Recorder (Rogers) 77 (Richmond County Ct. 1817).

¹² Rev. Stat. of N.Y. (1829), tit. 3, § 72.

Twelve states have enacted the priest-penitent statutes within the last five years (1957-1962). In 1962, the legislatures of Massachusetts and Virginia enacted statutes for the first time; in 1961, Delaware and Illinois; in 1960, Rhode Island, South Carolina, South Dakota, and Tennessee; in 1957, Maryland.

It is worthy of note that Rule 29 of the Uniform Rules of Evidence approved by the American Bar Association in 1953, which is a replica of the American Law Institute Model Code of Evidence¹³ of 1942, has not been enacted by one state in the two decades it has been available as a model. Yet during this time nearly a score of states have enacted "priest-penitent" legislation.¹⁴

No priest-penitent statute has ever been repealed after its adoption,¹⁵ which indicates that the legislatures of these states have not found that there has been abuse of the privilege whether the statute is narrow or broad, as was feared by the drafters of the narrow Uniform Rule 29. The trend, as will appear later, is toward broadening (1) the class of persons in the field of religious activities to whom one can communicate in confidence, (2) the class of people who may communicate under the privilege, and (3) the subject matter of the confidential communication.

The six states that have no priest-penitent statute (in 1962) are: Alabama, Connecticut, Maine, Mississippi, New Hampshire, and Texas. In none of these states is there a reported case dealing with the privilege.¹⁶

In developing the various aspects of the privilege, it is preferable to confine the analysis to the statutes more than to reported cases, because relatively few cases in the field have reached appellate courts. In the cases that have reached the appellate courts, those courts had to deal exclusively with the interpretation of the statutes of their respective states.

¹³ Section 219.

¹⁴ This is not to be taken as an inferred criticism of state legislatures—rather it is the other way round. The Kansas Judicial Council has a proposed amendment to replace the present § 60-429 of the Kansas Statutes with a modification of Rule 29 of the Uniform Rules of Evidence. In (1) of that proposed amendment the wording is different in import and much broader than Rule 29, while (2) is identical with Rule 29 except that the Kansas proposal uses the word "minister" instead of "priest."

¹⁵ New Jersey, in shifting the privilege from a statute to a "Rule," repealed the statute but at the same time adopted what is designated as "Rule 29." See N.J.L., 1960, c. 52. The N.J. Rule 29 is broader than the repealed statute in that it gives the privilege to "practitioner" as well as to "clergyman and any other minister" and adds "or other confidential communication" after "confession."

¹⁶ See, however, *Biggers v. State*, 358 S.W.2d 188 (Tex. Civ. App. 1962) for dicta concerning the lack of the privilege in Texas. See also 44 Tex. Jur. *Witnesses* § 103 (1936); McCormick and Ray on Evidence § 492 (2d ed. 1956).

In thirty of the forty-four states that have the statute, there are no cases cited under the priest-penitent statutes in the annotated statutes of those states,¹⁷ and there are no reported cases dealing with the privilege in the states that do not have the statute. Thus, only fourteen states have reported cases in this area.¹⁸ Lack of litigation involving the privilege is not to be taken as lack of need for statutes, however.

It is difficult to learn how many unreported cases have involved the privilege. It is these unappealed cases that have alarmed the clergy of some of the denominations.¹⁹

Where there is no privilege, a wilful group on a grand jury could freely embark on a "fishing expedition" just to find out whether there might be some information that could be extracted from clergymen of some minority sect.²⁰ Would grand juries resort to such practice if they knew it was not prohibited by law? (Doubters are referred to *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 1943.)

The fact that forty-four of the fifty states have such statutes, and many of them recently adopted, is a very strong demonstration

¹⁷ Alaska, Ariz., Del., Fla., Ga., Hawaii, Ill. Idaho, La., Md., Mass., Mont., Nev., N.M., N.C., N.D., Ohio, Okla., Ore., Pa., R.I., S.C., S.D., Utah, Vt., Va., Wash., W.Va., Wis., Wyo.

¹⁸ Ark., Cal., Colo., Iowa, Ind., Kan., Ky., Mich., Minn., Mo., Neb., N.J., N.Y., Wis.

¹⁹ Minutes of the United Lutheran Church in Am., 22nd Biennial Convention, 1960, at 802:

The Seal of Confession. During the last few years concern has been growing in church circles over the right and power of the courts of law to compel pastors to disclose confidential information given them in the course of their professional service. The fact that in two relatively recent cases clergymen were called upon to give such testimony has highlighted the issue.

A report by A. Robert Theibault of the D.C. Bar titled "Are Your Spiritual Communications Privileged?" made to the Baptist Joint Committee on Public Affairs in 1958 tells of a recent case in which a clergyman who refused to testify on the ground of privilege was cited for contempt and punished by a fine and sentence. The jurisdiction in which this happened and further details are not given.

²⁰ Wharton on Evidence § 596 (2d ed. 1879) presents an argument:

. . . [I]t would not be tolerable to use a religious duty on the part of a large section of the community as an engine for the extortion of secrets for the purpose of litigation. To issue subpoenas, for instance, . . . and bring into the office of a committing magistrate all the Roman Catholic Priests in the neighborhood, and then to force them to tell all they have learned in the confessional, as to any illegal acts, past or present, would be unnecessarily to plunge the State into a war with an ancient and powerful communion—a war in which that communion could yield nothing, having only two alternatives equally deplorable—its triumph over the State or the general imprisonment of its priests and the suppression of its worship.

of the public attitude toward the necessity for the privilege. Eighty-nine percent of the population of the country live in the states that have the privilege.

It is not always easy to determine the rationale behind the enactment of the priest-penitent statutes. Perhaps some legislators may have thought that the privilege was closely related to freedom of religion where the confession is required as a matter of the discipline of a particular church. Or, it may be that some thought of it more as the individual communicating with his God through an emissary. Some may have regarded it as a necessary therapeutic process whereby the penitent could obtain psychological and physical relief from fear, tension and anxiety. Or, maybe it was considered as being in the general realm of the right to privacy. Whatever the rationale was, the priest-penitent privilege is deeply embedded in American jurisprudence.

Who and what are affected by the statutes?

1. The individual clergyman is benefited because he knows that he can proceed with the complete assurance that confidences are protected by public policy.

2. The confessant is benefited by having a feeling of security in confiding in a priest without inhibitions when he is in need of spiritual aid and comfort. This security does not only apply to particular confessions that have been, or may be, revealed, but also to the member's general attitude toward the church as a protected institution.

3. The church, as an institution, is benefited. Public sanction through legislative enactments to protect the doctrines and practices of an institution is indicative of the prestige it enjoys in our society.

4. The judiciary of the trial courts benefits from the privilege. In a jurisdiction where there is no privilege statute, a trial judge is placed in a very uncomfortable situation when a clergyman is called to testify about matters revealed in a confession or other communication which he is under obligation to keep secret. The trial judge has no common-law authority by which he can declare the communication privileged. Yet, to attempt to make the clergyman testify will only end in refusal and possible imprisonment for contempt. He also would be aware of the fact that public opinion in all probability would be with the clergyman as it was in the *Van Sant* case in Delaware. There the legislature, while the judge was mulling over what to do, enacted a privilege statute showing clearly the public attitude. When the Delaware legislators realized that the Rev. Rex would not testify, they decided to legalize the inevitable. They knew

that no good purpose would be served if he were declared guilty of contempt and were to "go sit in the clink."²¹ Most trial judges cannot "get off the hook" so quickly and adeptly.

There are many aspects of the privilege and many variations in the statutes of the forty-four states. Therefore, the following questions need to be answered:

1. What do the statutes provide?
2. What qualifications must a "priest" or "clergyman" have to receive confidential communications under the statutes? Must he be ordained? Could a deacon exercise the privilege? Could members of a church board?
3. In addition to sacramental penance required by the discipline of the church, does the privilege apply (a) where the church has only voluntary confession of a formal nature (*e.g.*, the Episcopal Church), and also (b) where there is in fact no discipline requiring or permitting a formal confession? Could "discipline" apply to the obligation of the profession of the clergy? Must the penitent be a member of the clergyman's church? How informal can the confidential communication be?
4. In what kind of legal proceedings may the privilege be used? Criminal? Civil? Legislative committee? Administrative agency?
5. How is the determination made as to whether the privilege will be granted?
6. Is the privilege an absolute prohibition to testify or may it be waived? And, if so, by whom? And how?
7. What are the sanctions that may be imposed upon a clergyman who violates a statute?
8. What problems of public policy are involved and what are the dangers, pro and con?
9. Are the statutes constitutional?

II. THE STATUTES

Forty-four states have priest-penitent privilege statutes.²² Twenty-two of these statutes have substantially the same wording:

²¹ The Living Church, July 23, 1961, p. 6.

²² Alaska Comp. Laws Ann. § 58-6-5 (1949); Ariz. Rev. Stat. §§ 12-2233 and 13-1802 (1956); Ark. Stat. Ann. § 28-606 (1947); Cal. Civ. Proc. Code § 1881 (1933); Colo. Rev. Stat. Ann. § 153-1-7 (1953); Del. Code, tit. 10, § 4317 (1961); Fla. Stat. § 90.241 (1959); Ga. Code Ann. § 38-419:1 (1960); Hawaii Rev. Laws § 222-20 (1955); Idaho Code § 9-203 (1947); Ill. Rev. Stat. ch. 51, § 48.1 (1961); Ind. Ann. Stat. § 2-1714 (1933); Iowa Code § 622.10 (1950); Kan. Gen. Stat. § 60-2805 (1949); Ky. Rev. Stat. § 606.4 (1955); La. Rev. Stat. Ann. § 15:477 (1928); Md. Ann. Code art. 35, § 13 (1957); Mass. Ann. Laws ch. 233, § 20A (1962); Mich. Stat. Ann. § 27A.2156

A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the Church to which he belongs.²³

One state has the same wording but omits "in the course of discipline enjoined by the church to which he belongs."²⁴ In addition to the communication made to a priest in a confession, two states add "or admissions";²⁵ other states add "confidential communication" or just "communication,"²⁶ while four states do not use the word "confession" at all but use instead "communication," or "confidential information,"²⁷ or "information communicated to him in a confidential manner."²⁸

An example of a liberal statute is that part of the Minnesota statute which states:

. . . nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person;²⁹

This statute is broad enough to include within the clergy category all of Jehovah's Witnesses. By applying the privilege to "any communication," the statute goes far beyond the sacramental confession. By extending the privilege to a communication "by any person," the class of confessants thereby includes members of the clergyman's

(1962); Minn. Stat. Ann. § 595.02 (1947); Mo. Ann. Stat. § 491.060 (1949); Mont. Rev. Codes Ann. § 93-701-4 (1949); Neb. Rev. Stat. § 25-1201 (1943); Nev. Rev. Stat. § 48.070 (1957); N.J. Rev. Stat. § 2A:81-9 (1947); N.M. Stat. Ann. § 20-1-2(c) (1953); N.Y. Civ. Prac. Act § 351 (1939); N.C. Gen. Stat. § 8-53.1 (1959); N.D. Rev. Code § 31-01-06 (1960); Ohio Rev. Code § 2317.02 (1953); Okla. Stat. Ann. § 12-385 (1960); Ore. Rev. Stat. § 44.040 (1961); Pa. Stat. Ann. tit. 28, § 331 (1959); R.I. Gen. Laws Ann. § 9-17-23 (1960); S.C. Code § 56-861 (1959); S.D. Code § 36.0101 (1960); Tenn. Code Ann. § 24-109 (1959); Utah Code Ann. § 78-24-8 (1953); Vt. Stat. Ann. § 12-1607; Va. Code Ann. § 8-289.2 (1962); Wash. Rev. Code § 5:60.060 (1963); W. Va. Code Ann. § 4992 (1961); Wis. Stat. Ann. § 325.20 (1925); Wyo. Stat. Ann. § 1-139 (1957).

²³ Alaska, Ariz., Ark. (omits "without the consent of the person making the confession"), Cal. (includes "religious practitioner"), Colo., Idaho, Ind., Kan., Ky., Mich. (instead of "examined" uses words "allowed to disclose"), Mo., Mont., N.D., Ohio, Okla., Ore., N.Y., S.D., Wash., W. Va., Wis., Wyo. Some of these start out "no minister . . . shall" etc.

²⁴ N. Mex.

²⁵ Ill., Ind.

²⁶ Md., Neb., N.J., R.I.

²⁷ Ga., Iowa, S.C., Tenn.

²⁸ Fla., Ill., N.C., Va.

²⁹ Massachusetts has substantially the same provision.

church and members of other churches or members of no church. The motives that prompt the confessant to confide in the minister are only that he seek "religious or spiritual advice, aid, or comfort," not that he seek remission of sin. Other statutes are even broader. As will be seen later, one includes communications that involve a "moral trust."

There is a widely approved and recommended draft for a priest-penitent statute. It was adopted as Rule 219, Model Code of Evidence of the American Law Institute (1942), and as Rule 29, Uniform Rules of Evidence, of the National Conference of Commissioners on Uniform State Laws (1953) and approved by the American Bar Association the same year. It provides:

(1) As used in this rule, (a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

In the "Comment" following this Rule, it is said, "Any broader treatment would open the door to abuse and would clearly not be in the public interest." Yet the very broad Minnesota statute and the rather broad statutes of Georgia, Iowa, South Carolina, and Tennessee have not opened the door to abuse and there is no evidence that these statutes have not been in the public interest.

There are three recently enacted statutes that deserve special attention because they have provisions that are new. They are quoted below without comment but with the new and unique emphasized by italics.

Delaware: No priest, clergyman, *rabbi*, "*practitioner of Christian Science*," or other duly licensed, ordained or consecrated minister of any religion shall be examined in any civil or criminal proceedings in the courts of this State—(1) with respect to any confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious

body to which he belongs, without the consent of the person making such confession or communication, (2) with respect to *any communication made to him, in his professional capacity* in the course of giving religious or spiritual advice, without the consent of the person seeking such advice, or (3) *with respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.* (Effective Aug. 11, 1961).

North Carolina: No clergyman, ordained minister, priest or *rabbi* of an established church or religious organization shall be required to testify in any action, suit or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information *would violate a sacred or moral trust, when the giving of such testimony is objected to by the communicant: Provided, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.* (Enacted in 1959.)

Pennsylvania: No clergyman, priest, *rabbi* or minister of the gospel of any regularly established church or religious organization, *except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers,* who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in *any legal proceeding, trial or investigation, before any grand jury, traverse or petit jury, or any officer thereof, before the general assembly or any committee thereof, or before any commission, department or bureau of this commonwealth, or municipal body, officer or committee thereof.* (Enacted Oct. 14, 1959.)

Some of the other statutes have equally unique provisions which will be dealt with elsewhere.

III. HOW THE STATUTES DESCRIBE THE ONE WHO HEARS THE CONFESSION

Many of the statutes describe the ones who may hear the privileged communication as "priest or clergyman."³⁰ Some states use the words "minister or priest,"³¹ while others use only the word "clergyman."³² Where the statute extends the privilege to "minister of the gospel or priest,"³³ there is apparently no special significance to

³⁰ Alaska, Ariz., Colo., Idaho, Kan., Ky., Mich., Minn., Mont., Neb., Nev., N.Y., N.D., Ohio, Ore., R.I., S.D., Utah, Wash., Wyo.

³¹ Ark., Iowa, Vt.

³² Hawaii, Ind., N.M. Virginia uses the words "regular minister of religion."

³³ Ark., Iowa, Md., Mich., Pa.

be attached to the word "gospel." Eight of the state statutes specifically mention "rabbis,"³⁴ although they might be included in the term "priest." The privilege is also extended to "religious practitioners" in three states.³⁵ Three recently adopted statutes specifically confer the privilege upon "practitioners of Christian Science,"³⁶ and the South Dakota statute includes "healing practitioner." One hearing the confession must be "of an established church" in four states,³⁷ and "authorized to perform similar functions" of a priest in another.³⁸

What is meant by the words "an established church"? This is not defined in the statutes and there are no cases clarifying the meaning. Surely the meaning is not a church established by the government such as the Church of England. It could mean an incorporated body but beyond that it would be difficult to conjecture.

Some statutes extend the privilege to "ordained" persons.³⁹ Ordain has been defined: "To invest with ministerial or sacerdotal functions; introduce into the office of the Christian ministry."⁴⁰ Usually ordination is a specific and well-defined ritual; and in the Roman Catholic, Eastern Orthodox, Episcopal and some other churches, ordination is one of the sacraments. Most, if not all, of the Protestant churches have a formal ceremony, usually called ordination, which is required for one to become a minister or clergyman. Ordination, other than the sacramental or ceremonial ones, probably would not be recognized.⁴¹

None of the statutes requires that the clergyman be empowered to pronounce absolution as a qualifying requirement for him to come within the statute. No statute restricts the designation of the one who hears the confession to "priest." All add at least one more designation—always in Protestant or Jewish nomenclature.

Only two privilege statutes mention an age requirement for the clergyman to be able to use the privilege. The age there stated is twenty-one.⁴² There are some denominations that have children as ministers who preach regularly or at revival meetings. If the laws

³⁴ Fla., Ga., Ill., Mass., N.C., Pa., S.C., Tenn.

³⁵ Cal., Ill., N.J.

³⁶ Del., Fla., Mass.

³⁷ Cal., Md., Pa. North Carolina also adds "or religious organization."

³⁸ N.J.

³⁹ Mass., R.I., S.C.

⁴⁰ Webster's New International Dictionary (2d ed. 1958).

⁴¹ See The Watchtower of Jehovah's Witnesses, Oct. 15, 1962: "The only valid ordination to the Christian ministry comes from God," and not from man.

⁴² Tenn., Va.

of a state permit minors to become ministers, apparently confessions or communications made to them in confidence would be privileged under many statutes.⁴³

Could elders of the Presbyterian Church be permitted to use the privilege under a statute restricting the privilege to a "minister of the gospel or priest of any denomination"? The Iowa court held they could.⁴⁴ The court took the view that the decision of whether a certain officer of a church organization is a "minister" within the law of privileged communications must be determined by the ecclesiastical doctrines and laws of the particular denomination. In this case there was a communication by a fourteen-year-old girl to elders of the Presbyterian Church in regard to certain illicit intercourse had by her.

Only one statute, that of Pennsylvania, excludes certain persons who might attempt to claim the privilege. That statute excepts "clergymen or ministers who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers." This seems to preclude Jehovah's Witnesses from claiming the privilege even though all Jehovah's Witnesses are "ministers."⁴⁵

The Florida statute is the only one that mentions Episcopal clergy and it does so by extending the privilege to "rector of the Episcopal Church." This is a curious provision because in that church not only are "Rectors" authorized to hear confessions but also Bishops, Vicars, Curates, Deans, and Canons, as well as their clergy assistants.⁴⁶ By mentioning only "rector(s)," are all other Episcopal priests and bishops excluded from the privilege?

⁴³ "Qualified to be Ministers," Watchtower Bible and Tract Society (1955), p. 256: "There is not the slightest doubt that children and youths can be ministers of God."

⁴⁴ *Reutkemeir v. Noltje*, 179 Iowa 342, 161 N.W. 290 (1917).

⁴⁵ Jehovah's Witnesses, Royston Pike, 1954, published by Philosophical Library, Inc., N.Y.:

Jehovah's Witnesses constitute a society of ministers. . . . He has been "called" to the ministry by his fellow believers, and the Witnesses resent very deeply the fact that the persons whom they have called to the ministerial office are refused the recognition and denied the privileges that the Anglican parson, the Catholic priest, and the Methodist or Baptist or Congregationalist minister enjoy. . . . Ministers are divided into the two classes of Pioneers and Publishers.

⁴⁶ The Book of Common Prayer 529, 546.

A Dictionary of the Episcopal Church, 12th ed., defines Rector: "A Priest who is in charge of a parish." The statute might better have been worded, "Episcopal Priests and Bishops."

IV. "THE DISCIPLINE ENJOINED BY THE CHURCH" AND "THE PENITENT"

Whose "discipline" is the typical statute referring to when it requires that the confession or confidential communication be "in the course of discipline enjoined by the church to which he belongs"? This language appears in twenty-nine state statutes.⁴⁷

It is obvious the typical statute is not free from ambiguity in answering the question: Whose discipline? Does the statute mean the clergyman shall not be examined as to any confession made to him in his professional capacity, in the course of discipline enjoined by the church to which he, *the priest or clergyman*, belongs? Or, the discipline enjoined by the church to which he, *the penitent*, belongs?

Could the typical statute with its discipline clause be interpreted in such a way that it means that the discipline of the church must require the communicant to go to confession and without this requirement there is no privilege under the statute?

Says the Arkansas Court:

There is no evidence in this case that there is any discipline or rule of practice of the church to which appellant and his pastor belonged which enjoins upon its members the duty to make a confession of sins. The statute does not apply unless the confession is made "in the course of discipline enjoined by the rules or practice of such denomination."⁴⁸

"A communication to be privileged must be made by a penitent as an enjoined religious discipline."⁴⁹

Kentucky,⁵⁰ Indiana,⁵¹ Kansas⁵² and Missouri⁵³ give the same

⁴⁷ Alaska, Ariz., Ark., Cal., Colo., Del., Idaho, Ill., Ind., Kan., Ky., Mich., Minn., Mont., Neb., Okla., Ore., N.Y., N.D., Ohio, R.I., S.C., S.D., Tenn., Utah, Wash., W. Va., Wis., Wyo.

⁴⁸ *Sherman v. State*, 170 Ark. 148, 279 S.W. 353 (1926). Appellant was being tried for rape. Letter was sent to minister asking for prayers.

⁴⁹ *Alford v. Johnson*, 103 Ark. 236, 146 S.W. 516 (1912). Contest over will. Decedent when near death in hospital told Methodist minister whereabouts of old will. Also had had previous discussions about his adulterous relations with woman claiming under will and had discussed becoming a Methodist.

⁵⁰ *Johnson v. Comm.*, 310 Ky. 557, 221 S.W.2d 87 (1949).

⁵¹ *Knight v. Lee*, 80 Ind. 201 (1881). Case dealt with testimony of an elder and deacon of the Christian Church. He was seeking evidence to sustain church charges against plaintiff. During this search, he talked to defendant who made an impolite remark about plaintiff, *viz.*, "She is nothing but a whore!" The action was for slander. The court held that the remark was not privileged and pointed out that a confession to be privileged must be "in connection with or in discharge of some supposed duty or obligation." (The case did not reveal whether defendant's opinion was based upon experience or hearsay.)

⁵² *In re Estate of Koellen*, 162 Kan. 395, 176 P.2d 544 (1947).

⁵³ *State v. Morgan*, 196 Mo. 177, 95 S.W. 402 (1906). The communication "must be made by a penitent as an enjoined religious discipline to a priest."

interpretation to comparable statutes. From the language of the cases in these states, it would appear that only the Roman and Oriental Catholic Churches, and possibly one or two more, have a type of discipline which would result in the privilege.⁵⁴ The Roman Catholic Church, by Canon 906, requires that the communicant attend the sacrament of Penance only once a year. Would the courts of these states deny the privilege to the second sacrament within a calendar year? The Protestant churches have no mandatory requirement for penitential or counsel-seeking communications within a certain time period, but it is understood that when the need arises the communicant ought to seek spiritual aid and counsel from his minister.⁵⁵ Thus, the Protestants are not privileged in those states.

A very different meaning can be given to the "enjoined" clause. "The word 'discipline' has various meanings. . . . The statute has a direct reference to the church's 'discipline' of and for the clergyman and as to his duties as enjoined by its rules or practice."⁵⁶

What is the discipline that binds the clergy to secrecy? Canons 889, 890 and 2369 of the Roman Catholic Church absolutely seal the lips of the clergy and provide for punishment should any reveal what particular confessants tell them in the confession.⁵⁷ The Seal of Confession was recognized by the Church 747 years ago, by the 4th Lateran Council, 1215. The Anglican Communion, which includes the Episcopal Church, has most stringent discipline concerning "The Seal of Confession."⁵⁸

Opinion also says that "there is an entire absence of any showing in the record that defendant even belonged to the same religious denomination that the minister did."

⁵⁴ *Codex Iuris Canonici*. Canon 906.

⁵⁵ The Episcopal Church has a conditional requirement. The Book of Common Prayer 88.

⁵⁶ *In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931).

⁵⁷ *Codex Iuris Canonici*. Can. 889, 890, 2369.

⁵⁸ Cross, *The Oxford Dictionary of the Christian Church* 1234 (London, 1957): Seal of Confession. The absolute obligation not to reveal anything said by a penitent using the Sacrament of Penance. The obligation includes not only the confessor, but interpreter, bystander, eavesdropper, persons finding and reading lists of sins obviously drawn up for the purpose of the confession, and indeed everyone except the penitent himself. It covers all sins, venial as well as mortal, and any other matter the revelation of which would grieve or damage the penitent, or would lower the repute of the sacrament. The obligation arises from a tacit contract between penitent and confessor, from its necessity for the maintenance of the use of the sacrament by the faithful, and from canon law. The obligation covers direct and indirect revelation, e.g., unguarded statements from which matters heard in confession could be deduced or recognized, and admits of no exception, no matter what urgent reasons of life and death, Church or state, may be advanced.

The ministers of most Protestant churches likewise are obligated to keep confidential the communications revealed to them in their ministerial capacity. Although many denominations have not spelled out the precise description or definition of their discipline, their uncodified discipline or practice is as binding on them as though it were written. It is believed that a statement in the convention report of the largest Lutheran Church in the country states the usual Protestant discipline:

In keeping with the historic discipline and practice of the Lutheran Church and to be true to a sacred trust inherent in the nature of the pastoral office, no minister of The Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent a crime.⁵⁹

Not only is church policy and doctrine clear, but the statements of individual clergy are uniform, adamant and audacious—the same throughout the western world. They will not testify! When called before the court in 1961 to testify about confidential communications, a Delaware clergyman said, “I do not intend to testify, no matter what the judge decides. . . . I will not be coerced. This is a matter of conscience.”⁶⁰ An English Roman Catholic priest challenged Parliament in a statement he made in 1959, “The secrecy of the confessional is absolute. It has nothing to do with the law of the realm. Nothing in the world can change it, not even an Act of Parliament.”⁶¹

In view of all the complexities and attitudes involved, the judge would be slow to insist that the minister reveal confidences, and the minister quick in his refusal to testify.

A Minnesota case has a lengthy opinion that deals with these problems.⁶² Some excerpts are:

The “confession” contemplated by the statute . . . applies to a voluntary “confession” as well as to one made under a mandate of the church. . . . The “discipline enjoined” includes the “practice” of all clergymen to be trained so as to advance such “discipline,” to be alert and efficient in submission to duty, to concern themselves in the moral training of others, to be as willing to give

The Roman Catholic ruling on the seal (*Sacramentale sigillum*) is to be found in *Codex Iuris Canonici* (1918).

⁵⁹ Minutes of the United Lutheran Church in America, The 22nd Biennial Convention, 1960, at 277.

⁶⁰ The Living Church, July 23, 1961, p. 6. The adoption of the privilege statute while the judge was wondering how to rule was a result of this case.

⁶¹ See note 7 *supra*.

⁶² *In re Swenson*, *supra* note 56.

spiritual aid, advice, or comfort as others are to receive it, and to be keenly concerned in reformatory methods of correction leading towards spiritual confidence . . . [I]t is sufficient whether such "discipline" enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication. Such practice makes the communication privileged, when accompanied by the essential characteristics, though made by a person not a member of the particular church or of any church. Man, regardless of his religious affiliation, whose conscience is shrunken and whose soul is puny enters the clergyman's door in despair and gloom; he there finds consolation and hope. It is said that God through the clergy resuscitates. . . . When any person enters that secret chamber, this statute closes the door upon him and civil authority turns away its ear. . . . The question is not the truth or merits of the religious persuasion to which a party belongs nor whether the particular creed or denomination exacts, requires, or permits a sacred communication; but the sole question is . . . whether the party who bona fide seeks spiritual advice should be allowed it freely.

Rule 29 of The Uniform Rules of Evidence defines "penitential communication" as a "confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of *discipline or practice* of the church or religious denomination. . . ." This language, as does the language of most of the statutes, seems to place the emphasis on the discipline or practice of the church and not upon the communicant's attitude toward the confession or the attitude of the particular priest.

The "church discipline" requirement is completely lacking in the statutes of some states.⁶³ The Maryland statute, for example, provides that no clergyman "shall be compelled to testify in relation to any confession or *communication* made to him *in confidence by one seeking spiritual advice or consolation*." Under the Maryland statute, it would seem that anyone, whether a member of the clergyman's church or any church, could go to any clergyman of any church not only to confess but to seek spiritual advice or consolation and the communication would be privileged.⁶⁴

The North Carolina statute extends the privilege to "any information which may have been confidentially communicated to him . . . under such circumstances that to disclose the information would violate a sacred or *moral trust*." (However, the same statute also provides "that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice." No other state has such a provision.)

⁶³ Ga., Hawaii, Md., Nev., N.M., N.C., Pa., Vt.

⁶⁴ The Virginia statute has similar language but does not apply to criminal cases.

Is "counseling" included under the privilege? In most of the Protestant denominations, there is the practice of what is often called "counseling." In effective counseling with those who seek help, it is necessary that there be the greatest freedom for the one seeking counsel to reveal his errors. It is difficult for the one seeking counsel to discriminate as to what might be harmful or helpful in a future legal action at which the priest might be called upon to testify. Anything revealed in such counseling would certainly be understood by both parties to be completely confidential. In many churches, it is thoroughly understood that the ministers are under the same obligations to keep communications secret (even though they are engaged in "counseling"), as are the priests in the Roman Catholic Church hearing confessions. In fact, there might be an even greater pressure upon the Protestant clergyman for he would always identify the person by seeing him as well as hearing him; while the Roman priest might not identify the confessant because he would not see him in the confession booth and might not always recognize his voice.⁶⁵

The counseling with persons who are not penitents, who do not come for the purpose of confessing sins, and who may not seek spiritual aid and comfort in the accepted sense, presents quite another problem. This type of situation arises particularly in counseling about marital difficulties. A recent New York case brings out this problem.⁶⁶ A husband and wife were sent a message by a rabbi who had never met them, requesting them to come to his study. He did this because another rabbi, who knew the couple well before they moved from his area, had written stating that he had heard their marriage was about to break up and asked this rabbi of the synagogue near where they had moved to try to accomplish a reconciliation. The couple responded to the rabbi's request and met in his study. In litigation later, the rabbi claimed the communication privileged and the court ruled that what was said at the meeting was privileged. One aspect of this case should not be overlooked, namely, that the communication, if not privileged, might very well concern conduct not necessarily culpable nor unlawful—possibly not even sinful, yet would be very important testimony in a divorce suit.

⁶⁵ There is another possible distinction in discipline. If in the Roman and Eastern Orthodox churches, the "seal of the confession" applies only to the sacrament of confession, then it might not apply to remarks made before or after the confession. No state has a statutory provision covering this, but Puerto Rico has: ". . . nor as to information obtained by him from a person about to make a confession and received in the course of preparation for such confession."

⁶⁶ *Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961), *appeal dismissed*, 16 App. Div. 735, 226 N.Y.S.2d 931 (1962).

Many churches, either by written or unwritten church discipline, require marriage counseling as is required in the Episcopal Church by Canon 16, section 6(c) which reads: "When marital unity is imperilled by dissension, it shall be the duty of either or both parties, before contemplating legal action, to lay the matter before a Minister of this Church; and it shall be the duty of such Minister to labor that the parties may be reconciled."

In view of the growing emphasis on marriage counseling in most churches, it is well to consider this sort of situation in framing new legislation or amending the old. The Delaware statute (adopted in 1961) is the first one to deal specifically with this increasingly significant need:

No priest . . . shall be examined . . . with respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.

Should the privilege be extended to admissions made in a church trial the same as it does to the more usual confession or confidential communication?⁶⁷ In a church trial the accused and witnesses are requested to report at a given time and place to answer charges or questions framed by others. In the confession, it is different. The confessant chooses the time (within limits), the church, and voluntarily chooses the items to be confessed or communicated.

Whether a trial is privileged would depend, in part, upon the discipline of the church in regard to trials, particularly where there is the "discipline" phrase in the statute. Possibly the meaning of the word "confession" in the typical statute might also be important in determining whether the privilege extends to trials. In the Iowa case in which the minister and two elders of the Presbyterian Church called a 14-year-old girl before them after she allegedly became pregnant as a result of relations with a man over 21,⁶⁸ it would seem that the session was a trial and not a confession of the typical variety.⁶⁹ The court, however, made no distinction between a trial and a voluntary confession. In a trial the accused might not be seeking spiritual aid and comfort and, in fact, might not be asking even for

⁶⁷ Many, if not most, churches have provisions in their canons, statements of disciplines, constitutions, or similar works—sometimes rather elaborate—for trials. Examples: The Presbyterian Constitution and Digest, Presbyterian Church in the U.S., pp. 300-333 (1956); Discipline of the Methodist Church (1960) Part VI, Judicial Administration, pp. 258-293.

⁶⁸ *Reutkemeir v. Noltje*, *supra* note 44.

⁶⁹ The Presbyterian Constitution and Digest, p. 44, requires the member "to make private *confessions* of his sins to God."

remission of sins. A penitential spirit might be completely lacking. Of course, a church trial is different from a civil trial in that the accused would not have to submit to the former. The church cannot imprison for contempt or use physical force to make the accused or witnesses appear.

The fact that witnesses may be called and a record kept of church trials would seem to indicate that the discipline of the church by no means requires that church trials be kept secret. This would seem to eliminate the privilege in church trials if later the parties are called before a civil court.

Do the disciplines of the churches require that the confession be oral? There is a very broadly held opinion that a confession to a priest must be oral. It cannot be in writing and still be privileged because the mere fact that it is recorded creates the possibility that it might be looked at in the future and by others than the priest. Special provisions have to be made for mute confessants to communicate either by using the hand alphabet or writing down their transgressions on paper that can be destroyed, by using a slate that can be easily and effectively erased or by using an ink that quickly becomes transparent.⁷⁰ Would the discipline of the churches include a confession or confidential communication made by telephone? What if both telephones have extensions in other rooms and one party might be calling through a switchboard where the operator could easily listen in? This could very well happen to a person in a hospital, perhaps near death, who wanted to communicate with his minister but learned that for some reason the minister could not come to his bedside within a reasonable time. A telephone could be placed in the room of the confessant for him to communicate with the minister.

It is recommended that states with narrow, or narrowly interpreted, statutes consider amending their statutes (1) to include under the privilege all Protestant denominations instead of restricting the privilege only to the churches of the Catholic tradition, and (2) to permit non-members, as well as members, to communicate confidentially with any clergyman.

V. IN WHAT KIND OF LEGAL PROCEEDINGS MAY THE PRIVILEGE BE USED?

In most states the statutes apply the priest-penitent privilege in both criminal and civil cases before trial courts, especially those

⁷⁰ *Sherman v. State*, 170 Ark. 148, 279 S.W. 353 (1926). Proper not to apply privilege to letter sent by accused to minister to obtain prayers, which letter was indirect confession of charges against accused.

statutes which do not specify the kind of legal proceedings to which the privilege applies. The privilege would perhaps also apply to grand juries and coroner's inquests and similar hearings. The privilege statutes are almost invariably a part of the code dealing with evidence; therefore, the application of the privilege statute would have as broad an application as the evidence code and no broader,⁷¹ unless the statute gives broader application.

Some statutes enumerate the types of legal proceedings in which the privilege may be used. The South Carolina statute specifies "legal or quasi-legal trial, hearing or proceeding before any court, commission or committee" as the legal proceedings before which the privilege may be claimed. Delaware provides "civil or criminal proceedings in the courts of this state" in its statute. North Carolina uses the words "action, suit or proceeding." The Florida statute states "any litigation," while Pennsylvania uses the words "any legal proceeding, trial or investigation, before any grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, or before any commission, department or bureau of this Commonwealth, or municipal body, officer, or committee thereof." Illinois extends the privilege to "any court, or to any administrative board or agency, or to any public officer." Virginia is the only state that has a statute limiting the privilege to "any civil action," thereby excluding its application in criminal cases.

If, by statute, the state evidence code does not apply to administrative hearings and the privilege statute itself does not specifically mention administrative hearings, could the privilege, nevertheless, be claimed before a state administrative agency? Some states have administrative law codes which exempt administrative agencies from the general statutes governing the examination of witnesses before courts. They have the power to summon witnesses and interrogate them and frequently may punish for contempt if there is an unwilling witness. It would seem that unless the privilege statutes were broad enough in their wording to include administrative hearings or there were other statutes that extended the privilege to these hearings, then there would be no privilege in cases before administrative agencies.

It is interesting to note that thirty-nine of the privilege statutes do not mention types of proceedings to which the privilege applies.

⁷¹ West Virginia has a strange limitation. Its privilege statute is under Chapter 50, Justices (of the Peace) and Constables. It appears nowhere else. Apparently the privilege does not apply in its circuit courts.

VI. THE DETERMINATION OF ADMISSIBILITY IN COURT TRIALS

In a court trial it is generally a function of the judge to determine whether a priest-penitent communication is privileged. When an objection is made to the examination of any witness, ordinarily the trial judge has to determine whether the person will be permitted, or required, to testify. In a case where the witness called is a clergyman who claims the privilege not to testify, the judge will have to make his ruling based on the privilege statute of his state.

This preliminary hearing would involve one or more of the following inquiries:

1. Is the person a "priest, etc." within the meaning of the statute?
2. Does the discipline of the church (a) prohibit the priest from revealing the revelations of a confessant? (b) (and possibly in some states) require church members to confess? In some states the discipline of the church need not be considered.⁷²
3. Was the communication made under circumstances that priest or penitent, or both, thought it was confidential? Or, was it a part of the sacrament of confession in those churches that have sacramental confession?
4. If the statute requires the confessant to be a member of the clergyman's church: Is confessant a member of that church?⁷³
5. (In most states:) Has the confessant not consented to the examination?⁷⁴

In the determination of these questions under most statutes, it is not necessary, and would be a violation of the privilege statute, for the judge to inquire as to what was revealed in the confession.

The Florida statute, the only one with such a provision, states that:

It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as herein prohibited is offered, to determine whether or not that person possesses the qualifications which prohibit him from testifying to the communications sought to be proved by him.

Under this statute, if the privilege is claimed, the court need inquire only as to the status of the clergyman. Apparently, whether the communication was confidential by its nature, and made by a person seeking spiritual counsel or guidance, are facts to be determined by the priest himself.

In South Dakota the statute provides: "The objection that the com-

⁷² Ga. and Vt.

⁷³ See note 70 *supra*.

⁷⁴ See note 84 *infra*.

munication is privileged must be made by or in behalf of the person making the communication," and thus by inference the priest cannot make the objection. The typical statute,⁷⁵ which states that "no priest, without the consent of the person making the confession" may testify, would seem to require the penitent's consent as a preliminary finding.

The North Carolina statute has a provision not found in any other state: "[T]he trial judge in any trial may compel such disclosure if in his opinion the same is necessary to the proper administration of justice." The discretion of the trial judge apparently would be final because the only possible ground for review would have to be whether it "was in his opinion," and even the most ingenious logician could hardly make "his opinion" reviewable before an appellate court. The faith that the confessants have in the confidential nature of the confession would be destroyed by compelling disclosure, whether the disclosure was in the finding of the preliminary question or later in testimony before the jury. It would surely be insidious to churchmen for the judge to have to go into the contents of the confession in making the preliminary decision as to whether it "is necessary to a proper administration of justice," and it is difficult to see how the judge in South Carolina could make this decision without knowing the contents of the confession.

Also the question might be asked: How necessary to the administration of justice? "Slightly necessary" as corroborating evidence? Just plain "necessary" to explain other evidence? Or "absolutely necessary" because it is the only available evidence on one or more of the essential issues? "How necessary?" need never be inquired into by an appellate court because this is determined only by the trial judge in forming "his opinion." Without the words "in his opinion," his discretion would be reviewable on appeal.

No statute requires that the confessant be one of the litigants and, therefore, the privilege extends to confessions of persons not involved in the litigation.

Of course, a minister has no privilege that any other person would not have, except for the confession or penitential or confidential communication. The disciplines of the churches do not require secrecy beyond the spiritual confidential communication. Therefore, it is necessary to inquire as to just what is included within the concept of the confession or communication. Technically, the seal of the confession in the Roman Catholic and Eastern Orthodox Churches applies only to the communications made during the formality of the sacra-

⁷⁵ See note 23 *supra*.

ment. Statements made prior to or subsequent to the sacrament of penance may not be privileged.

No state statute covers this point, but the legislature of Puerto Rico considered it and in that statute it is provided "nor as to any information obtained by him from a person about to make a confession and received in the course of preparation for such confession." In California it was held that the preliminary examination of a penitent, in order to determine whether she was in a proper mental condition to make a confession, was not privileged and that the priest could properly testify as to her mental condition in a contest in the probate of a will.⁷⁶

Does the privilege excuse a clergyman from reporting to some law enforcement officer the observation of a gunshot wound of a penitent, as some states require of certain citizens? In 1961, the Ohio legislature enacted what is titled the "Gunshot Wound Law,"⁷⁷ which exempts clergymen or priests from this requirement if reporting the wound would violate a confidential communication.

Voluntary statements to a clergyman, not in his professional character, of course, would not be privileged;⁷⁸ neither are statements made to a minister acting as linguistic interpreter in a secular transaction.⁷⁹

Mention should be made here of the theory of the confession as understood by many in the Roman Catholic Church: The priest in hearing confession is acting as an agent of a higher authority and is in fact only a transmission agent and, therefore, what is heard in the sacrament of Penance is heard not by him in his role as a person in the community, and the courts can only expect him to reveal what he himself has heard as a person outside the confessional.⁸⁰

However, the Seal of the Confession is not so binding that a Roman Catholic priest cannot see that restitution is made without revealing the identity of the confessant, *e.g.*, a watch was given to the priest during confession to be returned to the rightful owner and the priest stated on the witness stand that he had received it during the confession but refused to divulge who gave it to him.⁸¹ Another type of situation may arise involving the same principle. A letter in the

⁷⁶ *In re Toomes' Estate*, 54 Cal. 509 (1880); *Buuck v. Kruckelbert*, 212 Ind. App. 262, 95 N.E.2d 304 (1950).

⁷⁷ Ohio Rev. Code § 2917.44 (1961).

⁷⁸ *Milburn v. Haworth*, 47 Colo. 593, 108 Pac. 155 (1910); *Knight v. Lee*, 80 Ind. 201 (1881).

⁷⁹ *Blossi v. Chicago & N.W. Ry. Co.*, 144 Iowa 697, 123 N.W. 36 (1909).

⁸⁰ *Greenleaf on Evidence* § 247 (14th ed. 1883).

⁸¹ *Reg. v. Hay*, 2 F. & F. 4 (1860).

*New York Times*⁸² from a writer in Milwaukee stated that a Roman Catholic priest announced that two men sentenced three years earlier for the shooting and robbing of a streetcar conductor were innocent. The guilty man had confessed to the crime in the sacrament of Penance, but the priest refused to divulge the name of the confessant.⁸³

VII. WAIVING THE PRIVILEGE

Although by the wording of most of the statutes it would seem that the privilege is that of the priest, the right to waive it is the privilege of the penitent. The statutes in many states say that the priest shall not be examined "without the consent of the person making the confession."⁸⁴ How can this privilege be waived?

Two states, Florida and Tennessee, specify waiver procedure:

. . . Such prohibition shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit properly sworn to by such a one, or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

North Carolina, instead of giving the privilege and requiring the consent of the one making the confession in order to remove it, puts it the other way, ". . . when the giving of such testimony is objected to by the communicant. . . ."⁸⁵ A recent statute in South Dakota states: "If a person offer himself as a witness he thereby waives any privilege he might otherwise claim, which would prevent the examination of his . . . spiritual advisor, or healing practitioner on the same subject within the meaning of [the privilege statute]."⁸⁶

It was held in Michigan, which has the typical statute but omits "without the consent of the person making the confession," that the penitent waived the privilege by himself testifying as to what took place at the confession. The court used the words "he cannot complain" which would indicate that there was a doctrine such as estoppel in mind in making the ruling which had no statutory foundation.⁸⁷

It would seem that in most jurisdictions where waiver is possible, it may result from:

⁸² Jan. 26, 1888.

⁸³ See discussion of this problem in Part IX *infra*.

⁸⁴ This consent clause is omitted in the statutes of Ark., Del., Fla., Ga., Ill., Ind., Md., Mass., Mich., Mo., N.J., N.Y., N.C., Ohio, Pa., Vt., Va., W. Va.

⁸⁵ N.C.

⁸⁶ S.D. Code § 36.0102 (Supp. 1960). The Kansas and South Carolina statutes have provisions with similar import.

⁸⁷ *People v. Lipsezinska*, 212 Mich. 484, 180 N.W. 617 (1920).

1. Statement in open court by person who made confession, or by his attorney if the confessant is present.
2. Written statement in form of affidavit signed by confessant.
3. Possible stipulation outside of court by the parties involved.
4. Testimony by confessant concerning what transpired at confession which would be construed as either waiver or estoppel.

What about the privilege concerning the confession of one who has died? None but a devout spiritualist would contend that the confessant could give consent. But suppose the minister were to take it upon himself to decide that, if the man were alive, he would give consent for the minister to testify. Or, suppose the decedent had left a properly executed will or document in which he stated he wanted the priest to tell all. Under the North Carolina statute, which permits testimony unless it is objected to by the communicant, the priest would lose his privilege concerning the confession of one now dead.

Some of the state statutes that do not have the "consent" clause apparently prohibit testimony by a clergyman concerning statements made in the confession. The language used is "no minister shall [be allowed to] disclose,"⁸⁸ "shall not be competent witnesses,"⁸⁹ "shall be incompetent to testify,"⁹⁰ "shall not testify,"⁹¹ "shall not be allowed [or compelled] to disclose,"⁹² or "shall not be permitted to testify."⁹³

VIII. WHAT ARE THE SANCTIONS FOR VIOLATION OF THE CONFIDENCE?

If a priest or clergyman does not wish to exercise the privilege and does testify against the wishes, or without the consent, of the confessant, what are the resulting sanctions that may be imposed upon him?

The sanctions could be either criminal or civil. It would seem if one chose not to exercise a privilege bestowed upon him by a statute, unless the statute absolutely prohibits him from testifying concerning confessions, he should not be punished. But in some circumstances the privilege would be of little value to the counsel-seeker unless there were some sanction to seal the lips of a wilful clergyman.

Tennessee is the only state that provides by statute for criminal punishment for violation of the statute: "Any minister . . . violating § 24-109, shall be guilty of a misdemeanor and fined not less than

⁸⁸ Ga., Mich. *But see* *People v. Lipsezinska*, *supra* note 87.

⁸⁹ Ind.

⁹⁰ Mo. and W. Va.

⁹¹ Ohio and Wyo.

⁹² Ark., Md., N.J., N.Y.

⁹³ Vt.

fifty dollars (\$50.00) and imprisoned in the county jail or workhouse not exceeding six (6) months."⁹⁴ If the statute does not have such a punitive provision, it is doubtful whether criminal punishment could be imposed upon a clergyman who testifies concerning a confession even though the wording of the statute invoked absolute prohibition. Of course, such a violation of the statute would usually enable the person injured by the testimony to get a reversal on appeal, but that would be after "the cat was out of the bag."

Would the injured person have a civil action against a clergyman who violated the statute? There are no appealed cases on this point. If a legal right-duty relationship has been violated, it would have to be either a contract or tort.

A widely accepted Dictionary of the Christian Church⁹⁵ states concerning the "Seal of the Confession":

The obligation arises from a *tacit contract* between the penitent and confessor, from its necessity for the maintenance of the use of the sacrament by the faithful, and from canon law.

Despite this description, "a tacit contract," it is doubtful whether recovery could be had on the basis of contract law.

Could there be a recovery in tort? It seems doubtful because no theory of legal liability would fit such a case. Whatever moral rights and obligations may be involved in a violation of the "seal of the confession," there seems to be no tort basis for recovery.

Could one get an injunction in equity to enjoin a clergyman from testifying where the statute forbade him to testify without the consent of the one making the confession? If the confessor is a litigant, of course, objection could be made when the clergyman would be offered as a witness. But the confessor might not be a litigant. He might be in a distant town or in another state. Suppose he heard that there was a probability the clergyman would testify as to confidential communications he had made to him. Perhaps an injunction might be issued. Then, if he testified concerning those communications it would be contempt of court, but it would be highly improbable that a civil action could be brought by the confessor against the minister for damages resulting from such contempt.

IX. SOME PROBLEMS OF POLICY

1. Is it necessary to have a broad priest-penitent privilege?

About this there should be little doubt. It is needed by the clergyman, by those individuals who require spiritual counsel or a

⁹⁴ Tenn. Code Ann. § 24-110 (1959).

⁹⁵ See note 58 *supra*.

process by which they can be relieved from a feeling of spiritual guilt, by the church as an institution, by the trial judge and by society.

The reason for having the privilege appears to be very deep-seated. Among the things that are considered reprehensible and detestable by all men is the violation of a confidence by anyone. Among the most hardened criminals, as well as among the saintly and most law-abiding citizens, the feeling of revulsion is the same. A person should know he cannot confide in the town gossip, but if he cannot freely confide in a priest when seeking remission of sin or seeking spiritual aid and comfort, this would strike at the concept of confidence in a most critical area. Of all people, the minister is supposed to represent the highest in ethics and morals. His business deals with right and wrong, the ethical and unethical.

Most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege. They are bound by an overpowering discipline that dictates the strictest standards of conduct concerning the maintenance of the inviolability of the confidential communication made to them in their ministerial capacity. This is just as true of most Protestant clergy as it is of the Roman Catholic. Therefore, in a state without the privilege, a clergyman facing contempt charges for refusing to testify would have little trouble making the decision about what to do. He would refuse, face contempt charges, and imprisonment. The pressure from an institutional standpoint would reinforce his determination. To testify would cast doubt upon the security all people have toward the secrecy of confidential communications to the clergy.

People take for granted they have the complete right to talk to their ministers penitentially in confidence. "Whether it is the law or not, people have the right to go to an ordained clergyman and tell their troubles without fear. This is the refuge of people in trouble, acknowledged by all men of goodwill."⁹⁶

The Iowa court has recognized "that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. . . ."⁹⁷

If the privilege were taken away and the confidential nature of the penitential communications violated and disregarded, the work of the church would be greatly hampered and a purely secular society would be well on its way.

Since the confidential communications may give relief from

⁹⁶ Statement of clergyman who had refused to testify and was awaiting judge's decision on contempt and imprisonment. *The Living Church*, July 23, 1961, p. 6.

⁹⁷ *Reutkemeir v. Noltje*, *supra* note 44.

tensions and anxieties, is not the psychological therapeutic value to the individual, and thus to the body politic, significant enough that we should protect the relationship that accomplishes this result? The need for improving mental health has been recognized and emphasized. Newspaper columns and magazine articles constantly deal with this increasingly important problem. The field of psychiatry has grown. The confession, or confidential communication, is too important to the people to permit the security of the penitent to be shattered, particularly when he may not be well equipped to distinguish between sin and crime, for what may or may not later be of probative value in a possible future law suit.⁹⁸

Today, the need for the statute, and a broad one, is made more manifest as a result of the development within this century of a greater psychological understanding and analysis of the working of the human mind. This progressive awareness is reflected in the more recent statutes. As an example, the Massachusetts statute enacted in 1962 in part states:

... nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to *any communication* made to him by *any person* in seeking religious or spiritual *advice or comfort*, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person. (Emphasis added.)

Statements in confessions could be inaccurate, and could be intended to mislead, if an unscrupulous confessant thought the statements could be used later in a trial. Due to the belief in the usual truthfulness of facts told during the confession, the testimony of a clergyman concerning the confession might be given too much weight in reaching a finding. Suppose that in a state where there is no privilege, two men, Mr. Badd and Mr. Worse, plan to hold up a small store in a residential neighborhood. Badd pleads with Worse not to take a pistol along, but to no avail. In the hold-up, Worse shoots the old storekeeper. Thereafter, Worse goes to confession and, instead of submitting to the priest his murder of the old man, confesses that

⁹⁸ On the other hand, it is doubtful whether the needs of the individual would be carried so far as to extend it to the well-known Negro group which call themselves "Muslims," even though they might refer to their organization as a church. Very few people would want a statute that would extend the privilege to some of the pietistic groups who have revived the pattern of early church life, in which the gathered community of believers is itself the receiver of confession and the proclaimer of forgiveness and absolution. (The group called Moral Rearmament has made group confession a structural part of its life.)

he drove the car to the holdup scene and, although he pleaded with Badd not to kill the man, Badd nevertheless did it, and then Worse drove him away from the scene. This confession and admission of guilt to being an accessory before and after the fact, made as a means of shifting the blame for the actual murder from himself to Badd, might be rather potent evidence.

2. Should the privilege apply only to confessions of members of the clergyman's church?

A woman, a member of the Baptist Church, was greatly distraught—contemplating suicide. She felt an impelling need to confess. In the belief that all Episcopalian priests hear confessions and that they are sworn to secrecy, she telephoned a priest of that church after midnight and they met at the church. The "penitent," who was undergoing a severe emotional crisis and had a "scrupulous" conscience, confessed and was advised by the priest. She was greatly relieved and after a time returned to some semblance of a more normal outlook. "There is great mobility of church members in going from one denomination to another."⁹⁹

Under the Uniform Rules of Evidence, this "confession" would not be privileged because Rule 29 (b) provides: "'penitent' means a *member* of a church or religious denomination or organization who has made a penitential communication to a *priest thereof*. . . ." (Emphasis added.) Is the fact that the "penitent" is a member of another church really important? If a possible objective is to give security to one seeking spiritual help and who is undergoing a severe emotional crisis, would it not be more realistic to protect the penitent by looking to the mental condition, attitudes and beliefs of the confessor at the time of the confession to determine privilege, than to inquire whether he had gone through the ritual of confirmation in the Episcopal Church? "The clergyman's door should always be open; he should hear all who come regardless of church affiliation."¹⁰⁰

Of course, an objective test, such as records of baptism and confirmation of the penitent and the written discipline of the church, as a basis for determining whether the privilege applies in case of challenge, is the clear-cut, easy way. To go into the subjective psychological processes of the penitent at the time of the confession throws a difficult, time-consuming burden upon the court. Courts will always have difficult problems of admissibility, but that is at times inevitable.

3. Is it realistic to expect the penitent to learn what the law is in any given jurisdiction before going to confession?

⁹⁹ Dr. Eugene Carson Blake, stated clerk of the United Presbyterian Church in the U.S.A., TV program, *Lamp Unto My Feet*, Sunday, Oct. 28, 1962.

¹⁰⁰ *In re Swenson*, *supra* note 56.

Some may say that the burden should be on the penitent to find out whether the planned confession is within the privilege—that ignorance is no excuse. In a time when there are great shifts of population from one jurisdiction to another (40,000,000 Americans move each year), it is highly unlikely that a confessant would realize that the law pertaining to the privilege of priest and penitent differs from state to state. The law of priest-penitent privilege is not generally known or understood as is the law pertaining to murder, arson, or the other crimes. Murder is murder in any state. Few would suspect that confessions are not privileged in some jurisdictions. No doubt, most confessants in El Paso, Texas; Oxford, Mississippi; Portland, Maine; Birmingham, Alabama; New Haven, Connecticut; or Farmington, New Hampshire, are not aware of the lack of statutory sanction for the confidential nature of the confession.

Perhaps it is well to remember that the confession that needs the privilege most is the confession made while the confessant is in a state of severe emotional crisis. This is not a time when one calmly goes to a law library to look up the law or to conduct a careful investigation into the doctrines of the church or the authority of the one hearing the confession. If the penitent knows a lawyer, which he may not, it is unlikely that it would occur to him at that time to consult the lawyer about the law of priest and penitent privilege in that state before going to confession.

Human nature being what it is, can anyone, however enthralled by empty logic he may be, or fearful of dire results that do not happen, really expect the sorely troubled confessant to find out beforehand what the law is concerning privilege in that jurisdiction before going to confession?

There is great need for a modern priest-penitent statute that would be acceptable to state legislatures. Rule 29 of the Uniform Rules has been demonstrated to be totally unacceptable.

4. Should the privilege be confined to sacramental confessions and denied to "confidential communications" or "counseling"?

People are people, and people have the same feelings of guilt, sin, or a "scrupulous conscience," whether they are Roman Catholic, Eastern Orthodox, Episcopalian, or members of a denomination that from a doctrinal standpoint has no sacrament of Penance but does practice ministerial counseling. "Much pastoral counseling involves processes that could properly be called confession, leading toward processes that could be called forgiveness, reconciliation or absolution."¹⁰¹

¹⁰¹ Guilt and Forgiveness, a paper by Robert E. Elliott, Perkins School of Theology,

5. Should the penitent be allowed to waive the privilege?

The churches of the Catholic tradition have no provision for breaking "the Seal of the Confession." Should they be required to do so, if the penitent insists that they do? Any violation of this strict rule would undoubtedly break down the respect in which the confession is held. The danger might not be so great were it not for the fact that the waiver is granted by the penitent at a time when he is not looking at the matter in its long-term perspective.

The waiver privilege could also be the instrument of abuse by a scheming, wilful, and debased person. He could confess a number of different versions to a number of different priests and then waive the privilege for the one who best suited his purpose but not waive it for the priests who would not serve his purpose.

There is another possible danger in permitting the penitent to waive the privilege. Psychiatrists are well aware of a certain type of mental illness that creates a compulsion in some people to admit and suffer for crimes they did not commit. As a matter of fact, these people sometimes are much more convincing than the real criminal. If such mentally ill people could call upon the clergy freely to corroborate such admissions, it would result in unnecessary and undesirable complications.

6. Is it safe to delegate to the clergy the power to determine what communication is privileged and what is not (as the Florida statute does)?

Someone has to decide whether a communication (or part of it) is privileged when the minister is called as a witness and claims the privilege. There are only three people who could possibly be considered for this decision: the minister, the penitent and the judge. Many ministers would be well-qualified by training and experience to make this decision. They would be able to look upon it with a higher degree of objectivity than penitents, for penitents would be biased.

Possibly (though improbably) a case might arise in which the clergyman would state that he thought the counseling was not confidential, but the counsel-seeker would state that he understood it was. This situation could arise more often in the Protestant churches where the communication is rather informal. If the counsel-seeker communicated in the bona fide belief that the communication was privileged, it would be reasonable to give great weight to his belief. Perhaps here the only reasonable solution would be for the judge to

make the determination of privilege after questioning both the priest and the confessant in chambers about their beliefs and other factors leading up to the confession without getting into the contents of the confession.

7. Should unordained "marriage counselors" or "psychologists" be given the privilege concerning communications made to them while employed as special assistants to clergymen?

Of course, the minister himself would have to have the privilege to refuse to testify about marriage counseling revelations before any consideration can be given to extending it to assistants. When the parties engage in marriage counseling, must it be in the nature of a repentant sinner seeking to confess his sins, do penance and obtain absolution, in order for it to be privileged? In some states, yes. Some marriage counseling would be privileged in states where the statutes in substance give the privilege to "communications" and do not confine it to the sacramental confession, but permit the privilege to one seeking "spiritual aid, or comfort." The privilege is specifically granted to clergymen for marriage counseling in the Delaware statute.

Looking at this problem from another angle: What professions may deal with marital problems and which of these are already privileged? The psychiatrist may deal with them. The lawyer, when a client comes to talk over a divorce, may be deeply involved in counseling. Professional marriage counselors who are usually trained psychologists also counsel. Of these (excluding for the moment the minister), the psychiatrist and lawyer would enjoy the privilege of confidential communication. In many states, if not most, the psychologist might not, unless he is also a physician.

Today, under the impact of modern specialization, we frequently find that several people, instead of just one, assist in rendering a particular service in any given field. The doctor may find it necessary to have a nurse present when giving a patient certain tests. Therefore, some states have included nurses within the privilege of the doctor. Likewise, lawyers' stenographers are included in some states. These assistants are really agents of the privileged professional man and are employed to do certain specialized things for him.

Would not the same need and the same logic apply to unordained specialists on the staff of a priest?

In view of the present trend for specialization, the privilege given to other professions in marriage counseling, the whole temper of our present learning and understanding, it would seem reasonable to extend the privilege to those agents of the clergy who are specialists in marriage counseling.

However, if the clergyman refers the counsel-seeker to an independent counselor not employed as an assistant to the clergyman, then, of course, the privilege could not apply, although there might be another statute making communications to such counselors privileged.

X. CONSTITUTIONALITY OF PRIEST-PENITENT STATUTES

It is not the purpose of this article to analyze the constitutionality of the priest-penitent statutes. But, it would be inappropriate not to raise two questions pertaining to the validity of the statutes in view of present trends.¹⁰²

1. Is there invidious discrimination in a state's classification which grants greater protection to persons in some churches than to persons in other churches?

There are several states that give the privilege only to those clergy whose churches require its members to attend the sacrament of penance and seal the lips of its clergy. In these states the privilege is not based upon status such as is the privilege of the lawyer, the doctor, and the spouse. The law does not provide that the disciplines of a certain group of doctors will be the determining factor in granting the privilege while those not within this discipline will not have the privilege. Nor is there any school of thought or practice within the legal profession that alone can enjoy the privilege while it is denied to other lawyers.

The privilege statutes of the other professions depend entirely upon status. It is not required that the client believe in any particular theory of disease or jurisprudence. The nature of the relationship and service is the only determining factor in the doctor-patient and lawyer-client privileges.

Is a classification that gives the privilege to a clergy of one or two churches but denies it to the clergy of scores of other churches a reasonable classification? The discipline as to confidentiality is nearly the same. The need of the individual is the same.

It is beyond question that the United States Supreme Court has demonstrated a trend to broaden the protection afforded under the equal protection clause. It is because of this trend that this question of the constitutionality of the priest-penitent statutes in those states that discriminate is raised.

2. Is the "establishment of religion" doctrine violated by priest-penitent statutes?

¹⁰² See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCullum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Engel v. Vitale*, 370 U.S. 421 (1962).

There are two aspects to this problem:

(a) Is state legislation that favors some churches over others a violation of the doctrine? The statutes of some states, as interpreted by their courts, extend the privilege to clergymen and members of some churches while denying the same privilege to clergymen and members of other churches. The privilege is given by these states only when the particular church (1) requires the confessant to come to confession regularly, and (2) the church discipline seals the lips of its clergy by stated prohibitions. The privilege is denied to those denominations which do not have these canonical enjoinders. Does this tend to the establishment of religion by giving these protections to some churches and denying them to others?

(b) Regardless of whether there is or is not a denominational discrimination, do all priest-penitent statutes violate the "establishment of religion" doctrine? Might it be urged that the obligation to answer a subpoena and testify in court is an obligation of all citizens and to excuse clergymen from this obligation on the ground of religion is in effect making the state and religion partners in this scheme? Is the state thereby breaking down the wall of separation between church and state?

XI. RECOMMENDATIONS

It is recommended:

1. That some national organization of attorneys sponsor the drafting of a statute covering privileged confidential communications to clergymen that would be modern and acceptable to state legislatures.¹⁰³

2. That the drafting committee be composed of 15 men to be chosen as follows:

a. Seven experienced legislative draftsmen: The man most responsible for the drafting of the priest-penitent statutes in each of the following states: Delaware, Florida, Maryland, Massachusetts, South Carolina, Tennessee and Virginia.

b. Four clergymen from major churches.

c. A trial judge.

d. Two legal educators.

e. A teacher from a theological school.

¹⁰³ Rule 29 of the Uniform Rules of Evidence has been unacceptable. The need for uniformity throughout the country in this day of widespread population migration from region to region is obvious.